No. 1067 (October Term 1966)

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING* SECOND PETITION FOR REHEARING AND MOTION TO RECALL JUDGMENT

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* This document is limited to the intervening circumstance of the Court's issuance of its *National Bellas Hess* decision, 386 U.S. 753.

La Salle Street Press—Chicago 60610

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MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

COMES NOW MILLER BREWING COMPANY, Appellant herein, by Frank H. Uriell and Paul A. Teschner, its Attorneys, and respectively moves that an order be entered herein granting Appellant leave instanter to file the Second Petition For Rehearing attached hereto and directing the Clerk to file said Second Petition For Rehearing.

The facts on which this Motion is based are as follows:

(1) On April 17, 1967, the Court granted the Illinois Revenue Director's motion to dismiss and dismissed the appeal in this case for want of a substantial Federal question. 386 U.S. 684.

(2) Thereupon Appellant filed a Petition For Rehearing which the Court denied. 387 U.S. 938.

(3) Said Petition For Rehearing was prepared before and did not reflect the issuance by the Court of its decision in *National Bellas Hess, Inc.* v. *Department of Revenue of the State of Illinois*, 386 U.S. 753; and the subsequent issuance by the Court of that decision is an intervening circumstance of substantial or controlling effect on this case.

(4) The *National Bellas Hess* case originated as did this case in Illinois and had as a fundamental issue as does this case the question whether the taxpayer owned property within the State of Illinois within the meaning of the Commerce Clause and Due Process Clause which would justify Illinois' assertion of its taxing power in the particular circumstances.

(5) On April 20, 1965, oral argument before the Circuit Court of Cook County in this case concluded with that Court's following reference to the significance, materiality, and relevancy of the ultimate disposition of the *National Bellas Hess* case to this case (R. 3, p. 81):

> "The Court: Now, I confess to you that I am very anxious to get something from the Supreme Court that will enlighten me, and maybe it will come out of the Bellas-Hess case, because that is the only one with which I am familiar now before me."

(6) The public interest will be served by the Court's reconsideration of its dismissal of this case for want of a substantial Federal question in light of the Court's subsequent holding handed down at the same Term in the *National Bellas Hess* case.

WHEREFORE, Appellant respectfully requests that this motion be granted.

SECOND PETITION FOR REHEARING

To the Honorable Justices of the
Supreme Court of the United States:

The Appellant, MILLER BREWING COMPANY, a Wisconsin corporation, by its Attorneys, Frank H. Uriell and Paul A. Teschner, respectfully requests a rehearing in the above-entitled case on the ground that the Court's decision in the case of *National Bellas Hess, Inc.* v. *Department of Revenue of the State of Illinois,* 386 U.S. 753, although issued subsequently to the Court's dismissal of this appeal, is completely inconsistent with the Court's decision in this case and is at least *prima facie* authority supporting a decision in this case in favor of Appellant.

Preliminary Statement

On April 17, 1967, the Court decided this case (386 U.S. 684) by granting the Illinois Revenue Director's Motion to Dismiss and by dismissing the appeal for want of a substantial Federal question. A Petition For Rehearing was filed in due course which was denied at 387 U.S. 938.

On May 8, 1967, the Court decided the case of *National Bellas Hess, Inc.* v. *Department of Revenue of the State of Illinois,* 386 U.S. 753. Unfortunately for Appellant, although the *National Bellas Hess* decision was issued at the same Term at which the Court's decision in this case was issued, Appellant had no knowledge of that decision when it prepared and filed its original Petition For Rehearing. Naturally Appellant does not restate here any grounds advanced in that original Petition but confines itself to the point that the decision of the Illinois Supreme Court in this case (35 Ill. 2d 86, 219 N.E. 2d 494) and this Court's decision in the *National Bellas Hess* case both pass upon the identical issue as to whether the respective taxpayers owned advertising property within the State of Illinois within the meaning of Federal constitutional limitations upon state

taxing powers; and that those two decisions, with all the relevant facts being identical, reached diametrically opposite conclusions of law.

I.

The Illinois Supreme Court's Determination That Appellant Owned Tangible Personal Property Within Illinois Is Directly Contrary To The Holding Of This Court In The *National Bellas Hess* Case.

The essence of the decision of the Illinois Supreme Court in this case is accurately summarized by the headnotes given to the case by the Official Reporter to the Illinois Supreme Court (35 Ill. 2d 86 at 86-87):

> "1. *TAXES—when brewer is owner of point-of-sale advertising material for purpose of use tax.* Where plaintiff, a manufacturer of malt beverage products, provides point-of-sale advertising material to its wholesale distributors by having the material shipped directly from out-of-state fabricators to the distributors and paying the fabricators only for materials actually shipped, it is the owner of the materials for purposes of the use tax, although it did not intend to take title and never included them in its inventory, where plaintiff caused the items to be brought into being, paid for their manufacture and exercised complete power of disposition over them."

In the *National Bellas Hess* case, the taxpayer also provided advertising material to Illinois residents by having catalogues shipped or mailed from outside of Illinois to residents within the State of Illinois. If the principle upon which the Illinois Supreme Court decided this case against Appellant were valid, therefore, this Court would necessarily have had to decide the National Bellas Hess case against the taxpayer. The reason for this is that this Court recognized that the State of Illinois would have had power to assess National Bellas Hess with the duty to collect use

taxes if it had owned property within Illinois (386 U.S. 753 at 758):

> "In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have had to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, *or property within a state*, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it." [Emphasis supplied.]

Insofar as the question of ownership of items of tangible personal property located within Illinois is concerned, the relevant facts are identical in this case with those present in the *National Bellas Hess* case. Appellant respectfully suggests that this case should be granted a plenary consideration so that a definite and definitive reconciliation can be made between this case and the decision of the Court in *National Bellas Hess.*

II.

Although *National Bellas Hess* Was Concerned With A Duty To Collect A Use Tax And This Case Is Concerned With Direct Assessment Of A Use Tax, The Same Constitutional Principles Govern.

In the *National Bellas Hess* case this Court recognized that the constitutional inquiry to be made there was precisely the same as that which should govern a final resolution of this case if plenary consideration is granted (386 U.S. 753 at 756):

> "• • • [T]he test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a state's compliance with the requirements of due process in this area are similar. • • • The same principles have been held applicable in determining the power of a State to impose the burden of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and a person, property or transaction it seeks to tax.' • • •"

And of course Appellant has properly raised both the Commerce Clause and Due Process questions on this appeal (Statement As To Jurisdiction, pp. 5-7).

III.

The Salfsame Burdens Which The Court Outlawed As Unconstitutional In *National Bellas Hess* Are Present Here And, Indeed, In More Vivid Form.

In this case, Appellant caused to be sent into Illinois point-of-sale advertising items to create a demand for its products; and since those products were themselves sold by independent Illinois retailers, they all bore their full share of Illinois Retailers' Occupation and Use Taxes. In the *National Bellas Hess* case, on the other hand, the taxpayer not only caused to be sent into Illinois advertising catalogs designed to create a demand for its products but, more significantly, sold those products from outside of Illinois in such a way that those sales did not bear their share of Illinois Retailers' Occupation and Use Taxes. Notwithstanding that, the Court held that Illinois was without power to assess amounts against *National Bellas Hess* (386 U.S. 753 at 759-760):

> "• • • [I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon

> National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'
>
> "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution this is a domain where Congress alone has the power of regulation and control."

Appellant also does business in the several States and the result of the Court's failure to grant plenary consideration to this case is precisely that which it decried in the above language. In operating its national advertising program, Appellant has hitherto been able to direct shipments of the POS advertising items to the several States unburdened by any need to allocate costs and determine destinations. Under the decision of the Illinois Supreme Court it will become necessary for Appellant to keep extensive accounting records as to the precise amounts of advertising items being sent to each of the States, the amounts paid by Appellant to the suppliers of those items, the many variations in rates of use taxes among the several States, the allowable exemptions among the several States, and records which will meet the various administrative and recordkeeping requirements of the several States. If the decision of the Illinois Supreme Court is allowed to stand without full examination by the Court, then Appellant will indeed become enmeshed "in a virtual welter of complicated

obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" This is because the several States give Appellant nothing in return for the powers it exercises outside of their borders in directing that the advertising items be sent into their several jurisdictions.

WHEREFORE, Appellant respectfully requests that because of the intervening circumstance of and based upon the *National Bellas Hess* decision, the Court grant a rehearing upon the Statement As To Jurisdiction, the Motion To Dismiss, and Appellant's Brief In Opposition To Motion To Dismiss previously filed in this case.

MOTION TO RECALL JUDGMENT

COMES NOW MILLER BREWING COMPANY, Appellant herein, by Frank H. Uriell and Paul A. Teschner, its Attorneys, and respectfully moves that, for the aforementioned reasons, an order be entered herein recalling from the Supreme Court of Illinois the Judgment of this Court in this case and the mandate which was mailed to the Clerk of the Supreme Court of Illinois on May 29, 1967. And in support of this motion Appellant suggests as authority for this procedure the case of *Cahill* v. *New York, New Haven and Hartford Railroad Co.*, 351 U.S. 183.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Frank H. Uriell and Paul A. Teschner, counsel for Miller Brewing Company, Appellant herein, certify that the foregoing Motion For Leave To File Second Petition For Rehearing, Second Petition For Rehearing, and Motion To Recall Judgment are presented to the Court in good faith and not for the purposes of delay.

/s/ FRANK H. URIELL

/s/ PAUL A. TESCHNER

Frank H. Uriell
Paul A. Teschner

Attorneys for Appellant

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

MILLER BREWING CO. *v.* JONES.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1067. Decided April 17, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.